87-1662

No. 87-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

HERBERT BRUCE SPENCER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Was Petitioner deprived of his right to appellate review, as provided by 28 U.S.C. Sec. 1291 and implemented by F.R.App.P. 3 & 4(b) and F.R.Cr.P. 32(a)(2), where the Court of Appeals utterly ignored his arguments that his several motions to dismiss the indictment were erroneously denied, and summarily ruled in a single sentence against most of the other issues raised, though all the issues were meritorious and most presented serious, constitutional questions?

2. Has the Sixth Circuit eroded the Fourth Amendment by ruling, contrary to the requirements of Coolidge v. New Hampshire, 403 U.S. 443 (1971), and in conflict with the Eighth Circuit in United States v. Clark, 531 F.2d 928 (8 Cir. 1976), that the "plain view" doctrine authorized certain contested seizures, where on the Record facts, the incriminating nature of the items was not "immediately apparent"?

3. Is the Fourth Amendment's specificity requirement nullified by the Sixth Circuit's improper use of the "plain view" exception to permit seizure of personal property and financial records of Petitioner and his family under a warrant authorizing search of Petitioner's home for the seizure of the "luggage and personal belongings" of a certain deceased person?

PARTIES BELOW

Plaintiff-Appellee:
United States of America

Defendant-Appellant:
Herbert Bruce Spencer, this Petitioner

[Also indicted with Spencer was Roy Creighton Blakeney, not arrested, and who did not appear to answer the charges.]

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TABLE OF AUTHORITIES

Cases

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The petitioner, Herbert Bruce Spencer (hereafter, defendant, or Spencer), respectfully prays that a Writ of Certiorari issue to review the judgment and Order of the Court of Appeals for the Sixth Circuit, entered on February 11, 1988.

Judgment and Order Below

The Unpublished Order of the Court of Appeals, No. 87-5169, is not reported. A copy is attached as Appendix A.

No Opinion was rendered by the District Court in entering the judgment reviewed.

Statement Of Grounds On Which Jurisdiction Is Invoked

The Order of the Court of Appeals was filed on February 11, 1988.

A timely petition for rehearing was filed and denied on March 17, 1988. (App. B)

No order granting an extension of time within which to petition for certiorari has been requested.

Jurisdiction to review the judgment by writ of certiorari is conferred on this Court by Title 28, U.S. Code, Sec. 1254(1).

Constitutional Provisions, Statutes and Rules

The Fourth Amendment to the Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,
> shall not be violated,
> and no warrants shall issue,
> but upon probable cause,
> supported by Oath or affirmation,
> and particularly describing the place to be searched,
> and the persons and things to be seized."

The Fifth Amendment to the Constitution provides, in pertinent part:

> "No person shall be ... deprived of life, liberty, or property, without due process of law."

The Sixth Amendment to the Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

18 U.S. Code 2 provides:

> "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

28 U.S. Code 1291 provides, in pertinent part:

> "The courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts."

F.R.App.P. 3, entitled "Appeal as of Right--How Taken," provides that an appeal as of right shall be taken by filing a notice of appeal, and provides procedures thereto appurtaining, the details of which are not crucial to this appeal.

21 C.F.R. 1308.12(d) provides, in pertinent part:

> "(d) Stimulants. Unless specifically excepted or unless listed in another schedule.... [the drug is a Schedule II drug]."

F.R.E. 403 provides:

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

F.R.E. 404(b) provides:

"Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."

F.R.E. 801(d)(2) provides:

"Statements which are not hearsay

A statement is not hearsay if--

* * *

(2) Admission by party-opponent
The statement is offered against a party and is (A) his own statement, in either his individual or a representative

capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

STATEMENT OF THE CASE

After a jury trial, defendant was convicted of conspiracy, in violation of 21 U.S.C. 846, to commit offenses in violation of 21 U.S.C. 841(a)(1), with regard to manufacture of, and possession with intent to distribute and manufacture, methamphetamine, a Schedule II controlled substance (Count 1); and of possession with intent to distribute phenylacetone (P2P) [a precursor of methamphetamine] (Count 2), and methamphetamine (Counts 3 and 4).[1] The

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1. Indictment, R. 1. Here and hereafter: "R." refers to items contained in the Record on Appeal; R. 23 contains Transcript of Proceedings of May 16, 1986, hearings on defendant's pre-trial Motions to Suppress. The Transcript of Proceedings at trial consists of 12 volumes, designated I through XII, individually paginated, totalling some 1913 pages. Transcript references to the pre-trial motions hearing are to specific pages of R. 23, while all other

jury found defendant guilty (R. 94; Tr. XII, p. 118), after his pre-trial motions to suppress evidence (R. 18, 19) were denied. (R. 31) The court sentenced him to a total of 27 years imprisonment, with 10 years special parole. (R. 106)

In brief, the facts are: Defendant owned property near Whiteley City, McCreary County, Kentucky on which were found, pursuant to Federal and State search warrants, a methamphetamine manufacturing laboratory and various quantities of controlled substance. The government demonstrated defendant's

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Footnote 1 continued:

transcript references are to volume and page.

Defendant was charged in Count 1 with conspiring with Roy Blakeney and others. Blakeney was never arrested and did not appear to answer the charges. Counts 2 and 3 charged defendant and Blakeney with having aided and abetted each other. (R. 1)

possession of large sums of money and jewelry in his house, in his garage, and on his person.

Defendant, in his late forties, was a used car and truck dealer who used cash in his business transactions. (Tr. IV, pp. 64-65; Tr. IX, pp. 71, 119) He was never arrested for or convicted of any offense relating to drugs. He was landlord of the property where the laboratory was located. (Tr. IX, pp. 73-86) His defense was that he leased a self-contained portion of the building to Roy Blakeney and William "Bud" Wolk, d/b/a "Genco", and had no knowledge of any illegality. (Tr. IX, pp. 85-86, 142-43) He was a respectable citizen of McCreary County, in legitimate businesses for many years, with a wife and family,

and well-known at local businesses and banks.

Defendant offered innocent legitimate business explanations for his possession of the money and jewelry found. (Tr. IX, pp. 89, 97, 116-18, 120-25, 132) A legitimate source was demonstrated for a $100,000 Certificate of Deposit found in Mrs. Spencer's purse. (R. 23, pp. 52-58; Tr. VIII, pp. 36-38, 50; Tr. IX, pp. 63-65)

Although the laboratory was dusted for fingerprints, no prints of defendant were found therein; prints of Blakeney and Wolk were found, however. (Tr. VII, p. 128; Tr. IX, p. 96) Nor were defendant's fingerprints on the two 55-gallon blue drums found in his garage portion of the building. (Tr. VII, p. 129)

Although an Ohaus gram scale was found, (Tr. III, pp. 98, 100-01), defendant testified he used the scale to weigh precision parts of racing motorcycle engines, (Tr. IX, pp. 126-27), and presented a corroborative expert, (Tr. VIII, pp. 17-25), and a tool catalog, (Def. Ex. 24), containing a photograph of an Ohaus scale and describing its use for weighing precision parts. (Tr. X, p. 29)

Facts re Motions to Suppress

Procedural Facts: Based on a "raid" of his residential and business properties on March 6, 1986, defendant moved to suppress all evidence seized. (R. 18, 19; see R. 15.) After evidentiary hearing, (R. 23, pp. 2-85), the Magistrate recommended that the motions be denied, except with respect to

property seized from Mrs. Spencer's purse. (R. 26, 27) Defendant filed his objections to these recommendations. (R. 28, 29) The District Court denied the motions, (R. 31), recognizing defendant's continuing objection to all fruits of the search. (Tr. II, pp. 12, 121)

Search Pursuant to Federal Warrant: On March 6, 1986, federal officers searched certain property owned by defendant, pursuant to federal search warrant. The warrant and supporting affidavit specified the areas to be searched, and included photographs of the warehouse building and several nearby outbuildings, marking with red "x" marks the buildings and portions of buildings to be searched. The building is described in Attachment "A" of the warrant and affidavit as

> "being separated by an interior wall located approximately in the center of the building." (R. 26, p. 2),

and the area of the said building to be searched, per Attachment "A" is

> "more specifically the right half of said building as you look at it from Cabin Creek Road." (R. 26, p. 2)

The photograph, designating with a red "x" the right half of the building, clearly specifies thereby which portion of the building is to be searched. The other photograph (depicting several outbuildings behind the building) also clearly designates the right portion of the building as the area to be searched.

Nonetheless, items were seized during the course of the search pursuant to that warrant, from the <u>left</u> (garage) portion of the divided building--a portion not covered by the probable cause (arguably)

demonstrated by the affidavit and specified in the warrant. (R. 26, pp. 3-4)

While defendant gave consent for the federal officers to enter the left-hand (garage) portion of the building for the limited purpose of searching for a Cadillac automobile specified in the warrant, he did not give consent to search the garage. (R. 23, pp. 9, 16)

Search Pursuant to State Warrant: On March 6, 1986, pursuant to a State search warrant for defendant's residence--which was obtained on the basis of evidence seized pursuant to the earlier-executed federal search warrant just discussed--officers searched defendant's residence and seized a number of items, none of which was specified in the warrant, and most of which is non-contraband. This

search resulted in seizure of numerous evidentiary items used against defendant at trial.

The warrant specifically authorized search of the described residence for the limited purpose of seizure of "The luggage and personal belongings of William Wolk a.k.a. 'Buddy.'" (R. 26, p. 8) After search, the execution of the warrant reads, "Nothing found belonging to William Wolk." (Tr. VII, p. 33)

That the officers were looking for and seizing everything and anything, belonging to anybody, is demonstrated by the testimony of IRS Agent Ratliff, who participated in the search. (Tr. V, pp. 95, 97, 151-52) No effort was made to seize only evidence fitting the warrant's description.

Other Issues Raised

In addition to the Fourth Amendment issue(s), raised as Point 2 of his appeal, Spencer raised and argued the following issues:[2]

1. The court erred in denying: (A) defendant's Motion to Dismiss Counts 2 and 3 for failure to state an offense, and (B) defendant's Motion to Dismiss Counts 1, 3 and 4 for misclassification of the alleged controlled substance.

2. Defendant was deprived of his Sixth Amendment rights by evidentiary rulings allowing the government to introduce hearsay statements while precluding defendant from so doing.

3. Admission of "other crimes" evidence deprived defendant of a fair trial.

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2. Additional details respecting the issues raised by defendant and not properly considered by the Court of Appeals are briefly set out within the course of this Petition where appropriate.

4. The court should have excluded certain evidence recovered from defendant's residence and garage.

5. The court should have granted defendant's motions for mistrial for unfair and improper cross-examination of certain defense witnesses.

6. Defendant was denied a fair trial by the cumulative impact of a number of prejudicial occurrences and rulings, as elaborated in the Argument.

7. Defendant was prejudiced by improper jury instructions pursuant to Pinkerton v. United States, 328 U.S. 640 (1946).

8. The court committed additional instructional errors which deprived defendant of a fair trial.

Court of Appeals' Decision

The Sixth Circuit did not mention at all defendant's arguments raised in Point 1; disposed of Point 2 by relying on the "plain view" doctrine to authorize seizure of the barrels pursuant to the federal warrant and of personal property

and financial records pursuant to the State warrant, (App. 7-11); rejected a portion of Point 4 ("other crimes" evidence) [raised as Point 4(a)] in two paragraphs (App. 17-18); and disposed of all the other points raised in the appeal in a single sentence. (App. 18)

REASONS FOR GRANTING THE WRIT

1.

The Sixth Circuit's failure even to acknowledge Petitioner's arguments that his several motions to dismiss the indictment were erroneously denied, and its cursory disposition in a single sentence of all but two of his other arguments, amount to denial of Petitioner's right to appellate review.

Pages 4 through 50 of Spencer's Court of Appeals' Brief are devoted to Argument. Of the 9 separate Points presented for review, (see pp. 16-17, supra for list), Points 1(A) and 1(B) (Def. Br. pp. 4-7), are not even mentioned in the Court of Appeals' Order (see App. pp. 6-18); Point 2 (Fourth Amendment issues), (Def. Br. pp. 7-26), is treated at App. 11-15 (some 5 pages of the Order); Point 4(a) (the "Chester Allison" aspect of the prejudicial "other crimes" evidence Point), (Def. Br. pp.

31-33), is treated in two paragraphs, (App. 16-17); and Points 3 through 9, (Def. Br. pp. 27-31 & 33-50) [excepting only Point 4(a), Def. Br. pp. 31-33]) are disposed of in a single sentence. (App. 18)

Defendant's right to appeal--which right is elaborated at pp. 32-38, below--is compromised and denied when the result of the appellate process dismisses what amounts to more than half the Argument portion of his Brief,[3] with:

> "Spencer's remaining objections to the fairness of his trial do not raise substantial questions affecting his Fifth or Sixth Amendment rights." (App. 18)

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3. While not presenting the merits of all these issues in detail in this Petition, Spencer demonstrates below the meritoriousness of some of the Points thus disposed of.

Failure to Mention at all, Motions to Dismiss Indictment [Points 1(A) & (B)]

Based on the legislative history of 18 U.S.C. 2 (compare present statute with its predecessor, 18 U.S.C. 550, replaced in 1948 by present sec. 2), and on language from a gaggle of decisions,[4] defendant moved to dismiss Counts 2 and 3, which charge that Spencer and co-defendant Blakeney aided and abetted each other in violating 21 U.S.C. 841(a)(1), and which fail to charge anyone with having been a principal perpetrator. (See Indictment, R. 1; Motion to Dismiss, R. 32.) The court's denial of this Motion (R. 56) was the subject of Point 1(A) of Spencer's Brief. (pp. 4-5)

4. E.g., Edwards v. United States, 286 F.2d 681, 683 (5 Cir. 1960); six other decisions in accord, from the D.C., 8th and 10th Circuits, also were cited.

And, per the "rule of lenity"[5] and/or the statutory structure,[6] defendant moved to dismiss Counts 1, 3 and 4 for misclassification of methamphetamine as a Schedule II substance, when it is actually classified in Schedule III. (R. 33) On appeal, (Point 1(B)), Spencer argued that this Motion should have been allowed--or, at the very least, that he was entitled to resentencing upon those counts as for a Schedule III, not a Schedule II, controlled substance. (Def. Br. pp. 6-7)

5. Ambiguities in criminal statutes must be resolved in favor of lenity to the defendant, including re sentencing. Bell v. United States, 349 U.S. 81, 83 (1955); Simpson v. United States, 435 U.S. 6, 14-15 (1978).

6. See 21 U.S.C. 812, Sched. III(a)(3); 21 C.F.R. 1308.12(d)(2); 21 C.F.R. 1308.13(b)(1).

From reading the Sixth Circuit's Order, it is impossible to ascertain that these arguments were raised at all. The Motions to Dismiss are not even mentioned. (See App. A.)

Issues Disposed Of In A Single Sentence

The list of issues raised is set out at pp. 16-17, supra. The merits of just a few of those issues are here highlighted to demonstrate that defendant was entitled to more than the single-sentence, cursory lip-service with which the Court of Appeals concluded its Order.

At pp. 9-10, supra, Spencer has highlighted the nature of his innocent landlord defense. The errors claimed herein, which the decision shrugged off, precluded any cursory finding of "no prejudice."

In Point 3, (Def. Br. pp. 27-29), defendant maintained that evidentiary rulings allowing the government to introduce hearsay statements while precluding defendant from so doing, deprived him of his Sixth Amendment rights to confrontation and to present defense evidence.[7] The District Court's evidentiary rulings complained of were made pursuant to F.R.E. 801(d)(2), which codifies the "co-conspirator statement exception" to the hearsay rule. Specifically, Spencer complained of three separate categories of statements which

7. In addition to the right of confrontation, Davis v. Alaska, 415 U.S. 308, 315 (1974), the Sixth Amendment also guarantees the separate and discrete right to present evidence in support of one's defense. Chambers v. Mississippi, 410 U.S. 284, 302 (1973); Washington v. Texas, 388 U.S. 14 (1967). (See Def. Br. pp. 27-28.)

the government was allowed to introduce pursuant to that Rule, while he was precluded from so doing.[8] Such application of F.R.E. 801(d)(2) as to allow the prosecution to introduce hearsay under circumstances where equivalent evidence is barred when offered by the defense, is so unreciprocal as to be fundamentally unfair. "A rule of practice must not be allowed for any technical reason to prevail over a constitutional right." Gouled v. United States, 255 U.S. 298, 313 (1921).

8. Tr. II, pp. 65-69, 72; Tr. IV, pp. 1-5; Tr. IV, pp. 13-14, 82; Tr. VIII, pp. 93-94, 128-35; Tr. IX, pp. 101-04. In context, the evidence that Spencer attempted unsuccessfully to introduce, would have substantially aided the defense. (See Def. Br. pp. 28-29.)

The Sixth Circuit did not discuss the merits of this issue, but included it within the summary one-sentence disposition set out above.

In Point 6, defendant complained of denial of his motions for mistrial based on unfair and improper cross-examination of certain defense witnesses, including his wife, Mrs. Alberta Spencer. (Def. Br. pp. 36-43) Specifically, Mrs. Spencer testified that when the "raid" commenced on March 6, 1986, she burned some personal, intimate photographs of herself, and some personal correspondence from defendant, which were "private." (Tr. VIII, pp. 143-45) On cross-examination, she denied there were any deeds amongst the papers she burned, and denied being aware that defendant owned property (condominiums) in the Virgin

Islands with Wolk and Blakeney. (Tr. VIII, p. 182) He owned no such property. Upon the prosecution's failure to demonstrate any good faith basis for these questions, defendant moved for mistrial, which was overruled. (Tr. VIII, p. 194; Tr. X, pp. 2-6, 8-10)

The prosecutor's unfair questioning of Mrs. Spencer concernng whether she had burned a deed (which never existed) and whether she knew her husband owned a condo in the Virgin Islands with Blakeney and Wolk, conveyed to the jury that the contents of the accusatory questions were true, despite the witness' denials. Once the witness denied the accusations, the prosecutor was duty-bound to present evidence substantiating the accusations; but this, the prosecutor candidly advised

the District Court, she could not do.[9] In context, the prejudicial impact was necessarily so immense it could not be cured by any cautionary instruction to disregard the evidentiary implications of the questions. Considering Spencer's position that his relations with those who ran the "drug factory" was that of innocent landlord, unaware of the illegal purpose to which his leased premises were being put, it was devastating for the jury to be exposed to this prejudicial and false information, via implications

9. The prosecutor knew that the informant, whose alleged statements to an agent (as supposedly related by an agent to the prosecutor) comprised the sole purported justification for asking the offending questions, was deceased at trialtime. Thus, the questions here were equally as improper as those condemned in Silverstein, discussed at fn. 10, infra, and in United States v. Brown, 519 F.2d 1368, 1390 (6 Cir. 1975).

in the accusatory questions, inviting the jury to conclude that Mrs. Spencer was burning the deed to the condo which Spencer owned with Blakeley and Wolk. Of course, this negated Spencer's position of innocent landlord, for it portrayed his relations with his alleged co-conspirators in a light more consistent with the government's theory than with Spencer's.

In utter disregard of Spencer's right to a fair trial, the Asst. United States Attorney engaged in a specifically forbidden tactic in such cross-examination of Mrs. Spencer.

> "[A] prosecutor may not use impeachment as a guise for submitting to the jury substantive evidence that is otherwise unavailable.... [citations omitted] Thus, a prosecutor who asks ... a question that implies the existence of a prejudicial fact must be prepared to prove that fact." United States v.

Silverstein,[10] 737 F.2d 864, 868 (10 Cir. 1984).

Accord, United States v. Brown, 519 F.2d 1368 (6 Cir. 1975), reversing defendant's escape conviction for prejudicially "loaded" questions for which the prosecution had no basis:

> "Laying such prejudicial allegations before a jury by dint of cross-examination without being prepared to prove them is

10. In Silverstein, the Tenth Circuit reversed defendant's conviction for murder in a federal penitentiary, where the prosecutor asked the defendant, on cross-examination, whether he had made certain [specific] damaging admissions to a particular inmate. Because the inmate had escaped from the penitentiary and was therefore "unavailable," the prosecutor knew he could not prove the substance of the alleged conversation, which defendant denied. The reviewing court held that it was therefore error to permit the prosecutor to ask such questions; and because the evidence, though "sufficient," was not conclusive, and the outcome depended on credibility determinations, the Court ruled the error required reversal and a new trial. Ibid. So, too, at bar.

generally regarded as reversible error." Id. at 1390. (Emphasis added.)[11]

Indeed, this Court has recognized the vice of "leading" questions lies in the likelihood that the jury will infer that the accusatorial contents of the question are true, which "lies at the root of the long-established rule that such questions may not properly be put unless the inference, if drawn, would be factually true." Stewart v. United States, 366 U.S. 1, 7 (1961).

The foregoing is but a synopsis of some of the issues raised by defendant

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11. Other decisions in accord include: United States v. Bohle, 445 F.2d 54, 73-74 (7 Cir. 1971); Jones v. United States, 338 F.2d 553 (D.C. Cir. 1964); United States v. Perlstein, 120 F.2d 276 (3 Cir. 1941); Lee Won Sing v. United States, 215 F.2d 680 (D.C. Cir. 1954); Richardson v. United States, 150 F.2d 58, 64 (6 Cir. 1945).

and not properly dealt with by the Court of Appeals. This court should scrutinize this case to ascertain whether the Sixth Circuit has discharged its duties with respect to Spencer's appeal.

THE RIGHT TO APPEAL

> "[T]he appeal of appellant imposes upon us [the reviewing court judges] the duty of determining the questions which he raises thereon." Leahy v. United States, 272 F.2d 487, 489 (9 Cir. 1959).
>
> "Our duty is to enunciate the law on the record facts." Empire Life Ins. Co. of America v. Valdak Corp., 468 F.2d 330, 334 (5 Cir. 1972).

The Court of Appeals' duty, as delineated above, is a necessary comcomitant of defendant's right to appeal. While there is no constitutional right to appeal, Abney v. United States, 431 U.S. 651, 656 (1977), citing McCane v. Durston, 153 U.S. 684 (1894), the right to appeal exists by virtue of

statute. 28 U.S.C. Sec. 1291. Abney, supra; United States v. Romero, 642 F.2d 392, 397 (10 Cir. 1981). Appeals as of right in criminal cases were first permitted in 1889, "in all cases of conviction of crime the punishment of which provided by law is death." Act of Feb. 6, 1889, 25 Stat. 656, cited in Abney, supra, 431 U.S. 656 n.3. In 1911, Congress created a general right of appeal in criminal cases. Act of March 3, 1911, 36 Stat. 1133. Abney, supra. That right persists today as 28 U.S.C. Sec. 1291.[12] It is implemented by F.R.App.P. 3 & 4(b), [prescribing Notice of Appeal and procedures, and details for

12. 28 U.S.C. Sec. 1291 provides, inter alia, that "The courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts ..."

appeals in criminal cases, respectively], and by F.R.Cr.P. 32(a)(2), requiring the District Court to apprise the defendant of his right to appeal, and the Clerk to prepare and file a notice of appeal if defendant so requests. See Nance v. United States, 422 F.2d 590 (7 Cir. 1970), remanding with directions, for District Court's violation of Rule 32(a)(2).

This Court has reaffirmed the defendant's right to appeal from a District Court's judgment of conviction in a criminal case, holding that indigent defendants must be treated the same as those with funds for purposes of administering forma pauperis criminal appeals. Coppedge v. United States, 369 U.S. 438, 447-48 (1962):

> "Since our statutes and rules make an appeal in a criminal case a

> matter of right, ... [the indigent appellant] is to be heard, as is any appellant in a criminal case, if he makes a rational argument on the law or facts." Ibid.

In Spencer's appeal, the Court of Appeals did not discharge its duty of "determining the questions" raised by appellant, Leahy v. United States, supra; the Court failed to perform its duty "to enunciate the law on the record facts," Empire Life Ins. Co., supra; indeed, except as to one or possibly two issues[13]

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13. Two issues (attacking various Counts of the indictment) were not even acknowledged in the Order. The only issue actually treated by the Court of Appeals on the merits, is the Fourth Amendment argument (Point 2 in Spencer's appeal). (App. 6-16) Several paragraphs of conclusory rejection comprise the Court's response to the "prejudicial evidence of other crimes" Point, (App. 16-18), while the balance of the issues raised by Spencer on appeal (summarized at pp. 16-17, supra), are summarily rejected in a single sentence. (App. 18)

raised in Spencer's appellate Brief, the Court of Appeals refused to allow appellant "to be heard," though he made "a rational argument on the law or facts." Coppedge, supra.

The right to appeal is of paramount importance to the judicial system.

> "[R]esolution of the merits of his appeal ... is an 'integral part of [our] system for finally adjudicating [his] guilt or innocence.'" United States v. Moehlenkamp, 557 F.2d 126, 128 (7 Cir. 1977), quoting from Griffin v. Illinois, 351 U.S. 12, 18 (1956).
>
> * * *
>
> "The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged." Coppedge v. United States, supra, 369 U.S. at 449, crediting [the late] Justice Schaefer of the Supreme Court of Illinois, in the 1956 Oliver Wendell Holmes Lecture at the Harvard Law School, reprinted as Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 26 (1956). Coppedge, id.

at 449 n.15. (Emphasis added.)

The refusal of the Sixth Circuit in this case duly to consider and determine so many of the meritorious issues presented in Spencer's appeal amounts to a denial of the statutory right of appeal. Certiorari should be allowed to permit this Court to speak on the alarming trend of the Courts of Appeals to dispose of multiple, viable issues summarily. The instant decision presents a typical example of such short shrift as to amount to denial of the right of appellate review.

In researching this issue, counsel discovered a paucity of decisions dealing with the particular requirements of the reviewing court's duty to review. Considering the importance of appellate review, this Court should grant

certiorari in this case as a vehicle for making a statement to the reviewing courts, discouraging the wholesale discounting of non-frivolous issues as was done at bar. It is painfully obvious that the Courts of Appeals are in need of guidance as to their responsibilities to appellants.

While the Judges and their Law Clerks may not wish to spend the time required to express in writing their reasons for ruling against Spencer as to every issue presented in his appeal, it is indeed unseemly for the Appeals Court thus to shirk its responsibility in the face of the 27 years imprisonment, plus 10 years special parole, which Spencer must bear. It seems only fair for the Court of Appeals to spend more time than it evidently has in reviewing the viable issues raised by Spencer.

2.

The "plain view" justification utilized by the Sixth Circuit to authorize certain contested seizures is contrary to the requirements of Coolidge v. New Hampshire, 403 U.S. 443 (1971), and conflicts with the Eighth Circuit in United States v. Clark, 531 F.2d 928 (8 Cir. 1976), where the incriminating nature of the items not was "immediately apparent" on the Record facts; thus, the Order erodes the Fourth Amendment.

3.

The Fourth Amendment's specificity requirement is nullified by the Sixth Circuit's improper use of the "plain view" exception to permit seizure of personal property and financial records of Petitioner and his family under a warrant authorizing search of Petitioner's home for the seizure of the "luggage and personal belongings" of a certain deceased person.

* * *

[Prefatory Statement to Points 2 and 3: although the questions are separately posed, they are argued together below due to overlapping arguments and supporting authorities.]

All relevant facts are set out at pp. 12-15, supra.

Both with respect to seizure of the drums containing P2P from the left-hand side of the garage--which agents had entered pursuant to Spencer's limited consent in connection with a federal search warrant specifying (inter alia) a car located therein--and with respect to seizure of numerous personal property and financial items from Spencer's home--which agents entered pursuant to a State search warrant calling for "luggage and personal belongings of William Wolk"--the Sixth Circuit's unjustified rejection of Spencer's Fourth Amendment challenges to the use of this evidence is based on a gross misapplication of the "plain view" doctrine as per established constitutional precedent of this Court.

The Sixth Circuit's position in Spencer's case not only conflicts with this Court's decision in Coolidge v. New Hampshire, 403 F.2d 443 (1971), and with the Eighth Circuit's decision in United States v. Clark, 531 F.2d 928 (8 Cir. 1976), but is contrary to a gaggle of prior Sixth Circuit cases as well.[14]

Seizure of Drums. To be subject to seizure pursuant to the "plain view" exception to the warrant requirement, not only must the items at issue be in plain

14. E.g., United States v. Szymkowiak, 727 F.2d 95 (6 Cir. 1984); United States v. Gray, 484 F.2d 352 (6 Cir. 1973); United States v. Truitt, 521 F.2d 1174 (6 Cir. 1975); United States v. McLernon, 746 F.2d 1098 (6 Cir. 1984); cf. Donta v. Hooper, 774 F.2d 716, 720 (6 Cir. 1985).

view;[15] it must be "immediately apparent" that the items are contraband or evidence of criminality.

Per Coolidge v. New Hampshire, supra, one of the requirements of the "plain view" doctrine is that the evidence of an unlawful act was "immediately apparent" to the officer. See United States v. Szymkowiak, 727 F.2d 95, 96 (6 Cir. 1984), citing Coolidge. Here, the drums

15. Because the drums were some 40-50 feet from the front area of the garage, (R. 23, pp. 10-11), Agent Malone proceeded to the rear of the garage to examine the two drums more closely. (R. 23, p. 11) All he could see from the position where he lawfully was, with Spencer's limited consent, (see R. 23, pp. 9, 16), were "two blue plastic drums," which were opaque and sealed. (R. 23, p. 7) Thus, there is genuine doubt whether the items were in "plain view," let alone whether it was "immediately apparent" that the items were contraband or evidence of criminality.

were sealed when seized. Malone's mere belief that they contained P2P, based only on the outward resemblance of the drums to one (seized from the right-hand side of the garage) known to contain P2P, is insufficient to support an objectively reasonable belief that the two drums contained contraband.

The decision below conflicts directly with that of the Eighth Circuit in United States v. Clark, 531 F.2d 928 (8 Cir. 1976), where the reviewing court affirmed the District Court's order granting defendant's motion to suppress a semi-automatic pistol discovered during search beyond scope of warrant to search for controlled substances, where the incriminating nature of gun was not

apparent.[16]

Since the Eighth Circuit in Clark and the pre-Spencer Sixth Circuit decisions correctly apply Fourth Amendment principles as enunciated by this Court in Coolidge, supra, the anomalous decision at bar, which portends dangerous erosion of the Fourth Amendment's protections, should be scrutinized by this Court.

Seizure of Personal Property and Financial Items. The Sixth Circuit acknowledges "that the [State] warrant specified only belongings of Mr. Wolk, not of the Spencers, as among the items

16. It also conflicts with prior Sixth Circuit decisional law; see, e.g., United States v. Szymkowiak, supra (exact nature of gun, not known to be illegal, absent interior examination; officer could not determine from exterior of gun whether its possession violated law); see also other 6th Cir. decisions cited in fn. 14, p. 41, supra.

to be seized." (App. 4) Thus, seizure of Spencer's property under this warrant violates the Fourth Amendment's requirement of specificity--of particular description of items to be seized. See, e.g., Marron v. United States, 275 U.S. 192, 196 (1927); Stanford v. Texas, 379 U.S. 476, 485 (1965); Walter v. United States, 447 U.S. 649, 657 (1980). Nonetheless, the decision below approves seizures of numerous items[17] which obviously were the Spencers', not Wolk's, on the basis that they were in "plain view" once the officers had (properly) intruded into small spaces (such as desk

17. Among the Spencers' property seized were bank records--some of which were found in Mrs. Spencer's purse--, income tax returns, address books, certificates of deposit; even the bankbook of Spencer's 9-year-old daughter.(!) (See R. 23, pp. 45-46, 57, 64.)

drawers) looking for the personal belongings of Wolk sought by the warrant. (App. 12) The Sixth Circuit's glib conclusion that the items seized, nonetheless, "were 'incriminating evidence' within the meaning of the 'plain view' doctrine," (App. 12-13) is contrary to the Fourth Amendment precedent above.[18]

Relying on Coolidge, supra, the Sixth Circuit had previously held that the "plain view" doctrine could not authorize

18. The testimony of IRS Agent Ratliff, who participated in the search, leaves no room for doubt that the officers were looking for and seizing everything and anything, belonging to anybody. (Tr. V, pp. 95, 97, 151-52) It is clear that trial testimony should be considered in assessing a Fourth Amendment claim. Gouled v. United States, 255 U.S. 298 (1921); Rouse v. United States, 359 F.2d 1014 (D.C. Cir. 1966); DiBella v. United States, 369 U.S. 121, 129 (1962).

seizure of a calendar and note pad, the incriminating nature of which was not "immediately apparent" without close scrutiny (involving opening up and reading) by the officers, based on Coolidge, supra.

> "The agents' 'immediate' sensory perception ... must produce probable cause of crime. In the case at bar, the agents' 'immediate' perceptions produced only visual images of two 'intrinsically innocent' items." United States v. McLernon, 746 F.2d 1098, 1125 (6 Cir. 1984), quoting from Coolidge, supra.

So, too, at bar.

Here, the items seized, which were obviously not Wolk's, were not inherently suspicious or obviously contraband. Conspicuously, the Sixth Circuit does not elaborate its conclusion that the items seized were "incriminating evidence"--nor, we submit, can such conclusion be supported.

> "To condone what happened here is to invite a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home, and, once inside, to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant." Stanley v. Georgia, 394 U.S. 557, 572 (1969) (Justice Stewart, concurring).

Such official misconduct (and see fn. 18, p. 46, supra, for evidentiary support for our interpretation of what occurred) is precisely one of the evils the Fourth Amendment was designed to prevent:

> "Because 'indiscriminate searches and seizures conducted under the authority of "general warrants" were the immediate evils that motivated the framing and adoption of the Fourth Amendment,' Payton v. New York, 445 U.S. 573, 583 ... [1980], that Amendment requires that the scope of every authorized search be particularly described." Walter v. United States, supra, 447 U.S. at 657.

* * *

Both with regard to the seizure of the drums from the left-hand side of the garage, and the seizure of Spencer's property from his home under a warrant calling for Wolk's, the Sixth Circuit's application of the "plain view" exception to the warrant requirement runs afoul of the Fourth Amendment as interpreted by this Court and by the Eighth Circuit, and as theretofore interpreted by the Sixth Circuit. Moreover, with respect to the seizures from Spencer's home, the specificity requirement of the Fourth Amendment is effectively nullified by the Sixth Circuit's decision in Spencer's case.

Accordingly, certiorari should be allowed so that this Court may repair the erosion already wrought upon the Fourth Amendment by the Sixth Circuit and

prevent any further evisceration of basic, constitutional law.

CONCLUSION

For the foregoing reasons, certiorari should be allowed. And, on the merits, defendant's convictions should be reversed, or reversed and remanded with appropriate directions. Alternatively, and at the very least, the cause should be remanded to the Court of Appeals with directions to decide the issues which it refused to decide and/or discuss in the instant decision.

Respectfully submitted,

JULIUS LUCIUS ECHELES
Attorney for Petitioner

A P P E N D I C E S

APPENDIX A
App. 1

Unpublished

No. 87-5169

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
FEB 11 1988
JOHN P. HEHMAN, Clerk

UNITED STATES OF AMERICA Plaintiff-Appellee	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY
v.	)	
HERBERT BRUCE SPENCER Defendant-Appellant	)	

Before: MERRITT and RYAN, Circuit Judges; and BROWN, Senior Circuit Judge.

MERRITT, Circuit Judge. Defendant was convicted in the District Court of several offenses under Title 21 of the United States Code growing out of an alleged conspiracy to manufacture and distribute methamphetamine, a Schedule II controlled substance. He appeals

principally on grounds that the District Court erred in failing to suppress evidence against him obtained as the result of unconstitutional searches and seizures, and on grounds that his trial was unfair due to improper prosecutorial questioning and to the admission of unsubstantiated testimony regarding prior drug transactions.

I.

On March 6 and 7, 1986, federal and Kentucky officers searched two buildings -- a home and nearby commercial structure -- owned by the defendant in McCreary County in eastern Kentucky. A warrant issued by a federal magistrate authorized search of the "right half" of the blue metal commercial building for the following items: methamphetamine, a

methamphetamine precursor called P2P, other precursor or derivative chemicals, laboratory apparatus, records, formulas, notes, currency, negotiable instruments, and two late-model automobiles, a Lincoln Town Car and a 1984 Cadillac Eldorado.

Upon search of the authorized right-hand area, the officers found the laboratory apparatus and a blue 55-gallon chemical drum that later proved to contain P2P. The defendant then informed the officers that the sought-for Cadillac was in the left-hand side of the metal building, which purportedly was being used as a repair shop of some kind; he then gave his consent for entry to seize the car. The officers entered the left-hand side and, while inspecting the car -- in which they found a small quantity

of methamphetamine -- spotted two other 55-gallon drums apparently identical to that found on the "laboratory" side of the partition. These two drums were then also seized.

Shortly thereafter, the authorities obtained a state search warrant for the nearby Spencer residence to seize "the luggage and personal belongings" of William Wolk, an alleged member of the drug conspiracy whose body was found in the Spencer residence a few days before March 6 and who was the owner of the Cadillac. They also extended their search of the left-hand side of the metal building to its attic, which could be reached only by pulling down a trap-door ladder on the ceiling of the left-hand side and climbing up. In the attic they

found various burglary paraphernalia, which were not later introduced at Spencer's trial, and three handguns with filed-off serial numbers, which were introduced over defense objection.

When agents entered the house, they discovered the defendant's wife, Mrs. Alberta Spencer, burning a variety of papers in the bathroom. An extensive two-day search of the house produced none of the sought-for belongings of Wolk, but did turn up large quantities of cash, jewelry, a $100,000 certificate of deposit and bank records. They also found quantities of methamphetamine and cocaine in the garage attached to the Spencer home.

II.

Spencer's first major argument is that his conviction was obtained by means of evidence obtained by unconstitutional searches and seizures. This argument can be divided into three groups of evidence -- the "left-hand" drums, the fruits of the state search warrant, and the guns taken from the attic.

Spencer has not argued that the federal warrant was invalid, and he concedes that the federal agents had a right to enter the "left-hand" portion of the metal building as a result of his consent to their entry for the limited purpose of seizing the Wolk Cadillac. He argues, rather, that the seizure of the two drums on that side was not encompassed by the "plain view" exception

to the ordinary Fourth Amendment requirement for a warrant. We disagree.

In Texas v. Brown, 460 U.S. 730 (1983), a majority of the Supreme Court embraced the "plain view" doctrine first advanced by a four-Justice plurality in Coolidge v. New Hampshire, 403 U.S. 495 (1971), and subsequently adopted throughout the circuits. See, e.g., United States v. Truitt, 521 F.2d 1174 (6th Cir. 1975); see generally Texas v. Brown, 460 U.S. at 747 n. 2 (Powell and Blackmun, Jj., concurring). Although the analytical justifications for the doctrine vary, plain view may be viewed either as an "exception" to the Warrant Clause or as an "extension" which provides grounds for seizure of an item when an officer's access to that item

"has some prior justification under the Fourth Amendment." Texas v. Brown, 460 U.S. at 739. The doctrine also incorporates the practical considerations that "requiring police to obtain a warrant once they have obtained a first-hand perception of contraband, stolen property, or incriminating evidence generally would be a 'needless inconvenience' that might involve danger to the police and public." Id. at 740 (quoting Coolidge, 403 U.S. at 468) (citation omitted).

In this case, the federal agent who entered the left-hand side of the building to search and seize the auto was lawfully and non-pretextually on the premises by virtue of Spencer's consent; thus his "access" to the two blue drums

was justified under the Fourth Amendment. Agent Malone testified that he could see the drums against the back wall in an unobscured line of vision from the front of the building, where he was lawfully positioned to view the Cadillac. App. 65. From that vantage point, the two blue plastic drums appeared "similar to almost identical" to the drum already seized on the right-hand side. App. 67. Malone had opened the drum earlier seized and had previously been told by an informant that the drum contained P2P. Relying further on his experience and familiarity with the types of apparatus and paraphernalia employed to manufacture methamphetamine, II. App. 34, Malone further stated that he didn't "recall ever seeing a drum that color and

of that material for anything other than what I had seen earlier, which contained P2P." App. 68. On closer inspection, the drums "were identical to the ones I had previously seen. They were sealed, had not been opened, the best I can determine. They had the same kind of markings on them and everything." In his opinion, the three barrels were "identical in every aspect, appearance-wise." App. 69.

Probable cause is the standard of suspicion sufficient to sustain a "plain view" seizure. See Texas v. Brown, 460 U.S. at 742-43 & n. 7 (plurality), 747 (concurrence). The Supreme Court has recognized that, in formulating these practical judgments, the police may rely on their training and experience to draw

inferences and deductions such as those reasonably drawn by Agent Malone here. See id. at 743-44 (plurality), 747 (concurrence). Malone's suspicions were supported by probable cause; the plain-view doctrine applies here.

Spencer next argues that the state warrant was not based on probable cause and that, in any event, the items seized far exceeded the scope of that authorized by the warrant. Again we disagree. The information supporting the warrant appears to satisfy the flexible, nontechnical, practical and common-sense standards that characterize our notion of probable cause. See Brinegar v. United States, 338 U.S. 160, 176 (1949); Carroll v. United States, 267 U.S. 132 (1925). And the warrant certainly satisfies the

good faith standard of United States v. Leon, 468 U.S. 897 (1984).

Because the warrant identified the personal "belongings" of Mr. Wolk among the items to be seized, intrusion into small spaces was authorized. Once into those small spaces, the agents encountered materials of evidentiary significance in the case, including bank records, a certificate of deposit and other belongings of the defendant or Mrs. Spencer. It is true that the warrant specified only belongings of Mr. Wolk, not of the Spencers, as among the items to be seized. The items seized, however, were "incriminating evidence" within the meaning of the "plain view" doctrine discussed above. And the authorization provided by the "plain view" exception

and by the warrant could only have been enhanced by the exigent circumstances created by the discovery of Mrs. Spencer's bathroom destruction of possible evidence. See Cupp v. Murphy, 412 U.S. 291, 297 (1973); cf. Welsh v. Wisconsin, 466 U.S. 740 (1984) (narrow scope to exigent-circumstances doctrine when intrusion into home is without a warrant and for a minor crime).

Spencer's final Fourth Amendment argument is directed at the guns, which were seized from the attic which he argues agents had no right to enter without obtaining a further warrant. Upon review of the relevant record in this case, we have concluded that it is unnecessary to reach the merits of this argument and that the District Court

correctly ruled that Spencer waived his right to object to introduction of the guns on this ground.

At Spencer's detention hearing, an agent testified that the guns in question were found in the attic. App. 42. Spencer's counsel moved pretrial to suppress "certain items ... recovered from areas not covered by the said search warrant: namely, from the left section of the building.... Items recovered from the left section of the building include those found inside a Cadillac vehicle." App. 46. Neither in the papers nor in oral argument did Spencer's counsel make any reference at all to the attic or to the guns. The magistrate's report and recommendation that this motion be denied, which was later adopted by the

District Court, made no reference to the attic or guns. In his objection to the magistrate's report, Spencer did not raise the issue. At trial, defense counsel moved in limine to exclude the guns from evidence, but only on grounds of relevance. II App. 1-4. When the guns were moved into evidence and shown to the jury, counsel represented to the court that its ground for objecting was "the previous objection, and -- That's all," referring to the relevance ground. II App. 117. Only after the guns had been shown to the jury did counsel first raise the attic issue following a motion for mistrial. Under these circumstances, we believe that the District Court correctly ruled that Spencer's motion was untimely both as a

matter of orderly criminal procedure, Fed. R. Crim. P. 12, 41, and for failure to follow the rule regarding objections to findings by the magistrate set forth in Thomas v. Arn, 474 U.S. 140 (1985). Spencer's argument before this Court that his counsel did not know of the details of the search of the metal building due to selective prosecutorial disclosure under rule 16 is belied by the testimony placed on the record in the detention hearing.

III.

Defendant's other main contention is that the Government introduced unduly prejudicial evidence of prior drug transactions in which he was involved. Spencer testified that he was ignorant of the activities engaged in by others in

the leased portion of the metal building, and also that he was a legitimate businessman with no knowledge of drug transactions.

To impeach this testimony, the United States questioned Spencer directly about prior drug transactions with a man named Chester Allison, which Spencer denied, and then called Allison as a rebuttal witness to testify about a series of marijuana and other drug transactions he engaged in with Spencer from 1980 to 1982, many of which involved the metal building at issue in this case. III App. 396-97. The Government also offered the guns, cash, valuable jewelry and Spencer's tax returns as evidence to corroborate the maintenance of a drug enterprise. We view this evidence as

proper impeachment, relevant and not unduly prejudicial. To the extent it reflected evidence of prior crimes or wrongs, it was properly admitted to prove knowledge or intent. Fed. R. Evid. 404(b).

Spencer's remaining objections to the fairness of his trial do not raise substantial questions affecting his Fifth or Sixth Amendment rights. The judgment of the District Court is affirmed.

APPENDIX B
App. 19

No. 87-5169

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
MAR 17 1988
JOHN P. HEHMAN, Clerk

UNITED STATES OF AMERICA Plaintiff-Appellee	)	ORDER DENYING PETITION FOR REHEARING
v.	)	
HERBERT BRUCE SPENCER Defendant-Appellant	)	

Before: MERRITT and RYAN, Circuit Judges; and BROWN, Senior Circuit Judge.

The defendant-appellant, Herbert Bruce Spencer, through counsel, Julius Lucius Echeles, of Chicago and Warren Scoville of London, Kentucky, have filed a harshly worded petition for rehearing accusing the Court of "utterly ignoring" defendant's argument and "egregious

misapplication of basic constitutional law." The Court has not overlooked the defendant's motions to dismiss counts of the indictment. It regards these motions as essentially frivolous. With regard to the defendant's claim of "egregious misapplication" the Court disagrees and declines to rehear these issues which it has already carefully considered and decided.

Accordingly, the petition to rehear is denied.

ENTERED BY ORDER OF THE COURT

_____

Clerk

APPENDIX C

UNITED STATES OF AMERICA	)	United States District Court Eastern District of Kentucky London Division
v.	)	
HERBERT BRUCE SPENCER	)	No. 86-6

JUDGMENT AND COMMITMENT ORDER

Entered on February 9, 1987 at London.

Defendant sentenced to 15 years on Count 1; 15 years on Count 2; 12 years on Count 3; 12 years on Count 4; Counts 1 and 2 to be served concurrently; Counts 3 and 4 to be served concurrently to each other; Counts 1 and 2 are consecutive to Counts 3 and 4 for total imprisonment of 27 years; special parole term on Counts 2, 3, and 4 in amount of 5 years on each count, with Counts 3 and 4 to run concurrently to each other but consecutively to Count 2 for total

special parole term of 10 years; special assessment of $50 on each count for total of $200 to be paid immediately to U.S. Attorney; Court declines to order restitution as Victim Impact Act is not applicable to conviction under Title 21.

Joseph E. Siler, Jr.
United States District Judge